

Catholic University Law Review

Volume 69
Issue 2 *Spring 2020*

Article 10

10-19-2020

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Anika Smith, *Meaning, Biology and Identity: The Rights of Children*, 69 Cath. U. L. Rev. 371 (2020).
Available at: <https://scholarship.law.edu/lawreview/vol69/iss2/10>

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Cover Page Footnote

J.D. 2020, The Catholic University of America Columbus School of Law; B.A. 2006, Seattle Pacific University. The author would like to thank God and all His angels and ministers of grace, including: her parents, for giving her a strong sense of her identity from the beginning; David Crawford, for his patient guidance and thoughtful questions; Helen Alvaré, for her inspiration and courage; and most emphatically, the staff and editors of the Catholic Law Review, for their thorough and careful work on this paper.

MEANING, BIOLOGY, AND IDENTITY: THE RIGHTS OF CHILDREN

Anika Smith⁺

When I discover who I am, I'll be free.¹

- Ralph Ellison, *Invisible Man*

Novelist Ralph Ellison was once asked whether the search for identity is “primarily an American theme.”²

“It is *the* American theme,” he answered.³ “The nature of our society is such that we are prevented from knowing who we are.”⁴

This is especially true for children who were conceived via gamete donation.⁵ There are no current official numbers available because the U.S. fertility industry is not required to report the number of children conceived through egg and sperm donation, but the estimate cited in news articles over the last several

⁺ J.D. 2020, The Catholic University of America Columbus School of Law; B.A. 2006, Seattle Pacific University. The author would like to thank God and all His angels and ministers of grace, including: her parents, for giving her a strong sense of her identity from the beginning; David Crawford, for his patient guidance and thoughtful questions; Helen Alvaré, for her inspiration and courage; and most emphatically, the staff and editors of the Catholic Law Review, for their thorough and careful work on this paper.

1. RALPH ELLISON, *INVISIBLE MAN* 243 (2001).

2. Alfred Chester & Vilma Howard, *Ralph Ellison: The Art of Fiction*, 8 *PARIS REV.* 55, 65 (1955).

3. *Id.*

4. *Id.* Ellison’s work is used by educators to discuss the importance of identity formation as a “universal experience” explored in his novel through “the limitations that racism places on the individual’s creation of the self.” Eric Maroney, *Racism and Identity in Invisible Man: Strategies for Helping “Non-Traditional” AP Students Succeed*, 2 *LITERATURE AND IDENTITY* 1, 6 (Aug. 2, 2016), <http://teachersinstitute.yale.edu/curriculum/units/2016/2/16.02.08.x.html>. This Comment takes the position that the limitations of racism on identity formation are related to the limitations of anonymous gamete donation, as both ignore or deny the equal human dignity of an entire class of people.

5. Gamete donation is the use of eggs or sperm from one person to create an embryo that is carried by another person. *Gamete (Eggs and Sperm) and Embryo Donation*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, <https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/gamete-eggs-and-sperm-and-embryo-donation/> (last visited Mar. 27, 2019). Donors may be known to the parents, but generally egg and sperm are sourced through a reproductive center or bank, where donors are often compensated for their gametes. See *Egg Donor Costs + Fees*, CONCEIVEABILITIES, <https://www.conceiveabilities.com/parents/parents-and-egg-donors/cost-and-fees/> (last visited Mar. 27, 2019).

decades has been somewhere between 30,000 and 60,000 American births by artificial insemination.⁶ Most of these donations are anonymous.⁷

Unlike the United States, some countries strictly regulate sperm and egg donation.⁸ In the United Kingdom, the Human Fertilisation and Embryology Authority (HFEA) allows children born through sperm and egg donation to request information about their donor parent or any potential donor-conceived siblings that may exist.⁹ The United States is comparatively lax in its governance of reproductive technologies,¹⁰ and its hands-off approach has prevented donor-conceived people from discovering who they are and where they come from.¹¹

People conceived via sperm or egg donation often express a longing for acknowledgment of the reality that they experience and the ability to know and tell their own stories.¹² As two social scientists wrote after a landmark study on donor-conceived people,

6. See Chris Bodenner, *When the Children of Sperm Donors Want Answers*, THE ATLANTIC (Jan. 29, 2017 9:00PM), <https://www.theatlantic.com/notes/2017/01/kids-of-sperm-donors/514814/>.

7. Glenn Cohen, Travis Coan, Michelle Ottey & Christina Boyd, *Sperm Donor Anonymity and Compensation: An Experiment with American Sperm Donors*, 3 J. LAW BIOSCIENCE 468, 468 (Nov. 23, 2016).

8. *Id.*

9. *Finding Out About Your Donor and Genetic Siblings*, HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, <https://www.hfea.gov.uk/donation/donor-conceived-people-and-their-parents/finding-out-about-your-donor-and-genetic-siblings/> (last visited Mar. 27, 2019).

10. Cohen et. al, *supra* note 7, at 469.

11. The donor-conceived community is very active online, as many donor-conceived people take to the Internet to search for their origins. See *Success Stories*, DONORCHILDREN, <http://www.donorchildren.com/groups/success-stories/> (last visited Mar. 27, 2019). Many share stories of searching for a decade or longer until, with the recent advances in genetic testing, finding their parents and (in their words) their identities. *Id.*

12. See Alana S. Newman, *About the Anonymous Us Project*, ANONYMOUS US PROJECT, <https://anonymousus.org/about/> (last visited Mar. 27, 2019) (stating “[a]ll stories are contributed anonymously because ‘anonymity in reproduction hides the truth, but anonymity in story-telling helps reveal the truth.’”). Many donor-conceived people have shared stories of their searches for their parents (often, but not always, fathers) online at “We Are Donor Conceived,” such as the woman who wrote:

Would these not be normal feelings for anyone else separated from their family and told their whole lives that it shouldn't matter? Maybe it's all too emotionally charged and inappropriate on my part, or maybe it's perfectly normal. Even if I reject the idea that I am out of place to want these things, [i]t is too deeply ingrained to not experience the shame and certainly not the bitterness towards those who think they understand how a life lived like mine SHOULD feel. Underneath all of these feelings, rational or not, is fear. Fear of more loss, rejection, and hurt. But at least when it is all through, I will no longer have the unknown. I will get, hopefully, what everyone else takes for granted and doesn't think I deserve as much as them, which is to simply know who you are and for you to know I exist.

abandonedbydefault, *I Am Foolish*, WE ARE DONOR CONCEIVED (Nov. 27, 2018), <https://abandonedbydefault.wordpress.com/2018/11/27/i-am-foolish/>.

Donor offspring may have legal and social parents who take a variety of forms—single, coupled, gay, straight. But they also have, like everyone else, a biological father and mother, two people whose very beings are found in the child's own body and seen in his or her own image reflected in the mirror.¹³

When donor-conceived people speak out on the issue, their perspectives are complicated and often negative.¹⁴ As one donor-conceived woman told *The Atlantic*, “Please don’t forget that infertility ‘treatments’ like egg and sperm donation affect the people they help to create. It’s worth noting that the majority of people conceived through anonymous sperm donation do not support the practice.”¹⁵ In fact, a 2010 study found that two-thirds of donor-conceived people agree that “[m]y sperm donor is half of who I am.”¹⁶ The majority reported that when they notice a stranger who resembles them, they wonder if they are related.¹⁷ Nearly two-thirds think donor-conceived people have the right to know the truth about their origins.¹⁸

Many donor-conceived people report feeling betrayed when they learned that their parents kept the truth of their origins from them; a truth which many of them suspected all along.¹⁹ Now that at-home DNA testing has become popular

13. Karen Clark & Elizabeth Marquardt, *The Sperm Donor Kids Are Not Really All Right: A New Study Shows They Suffer*, SLATE (June 14, 2010 11:23AM), <https://slate.com/human-interest/2010/06/new-study-shows-sperm-donor-kids-suffer.html>.

14. See generally *Donor Conceived Adults: Personal Stories*, DONOR CONCEPTION NETWORK, <https://www.dcnetwork.org/donor-conceived-adults/personal-stories> (last visited Mar. 27, 2019) (discussing the personal experiences of donor-conceived adults).

15. Bodenmer, *supra* note 6.

16. Clark & Marquardt, *supra* note 13.

17. *Id.*

18. *Id.* Clark and Marquardt also found that Regardless of socioeconomic status, donor offspring are twice as likely as those raised by biological parents to report problems with the law before age 25. They are more than twice as likely to report having struggled with substance abuse. And they are about 1.5 times as likely to report depression or other mental health problems. As a group, the donor offspring in our study are suffering more than those who were adopted: hurting more, feeling more confused, and feeling more isolated from their families. (And our study found that the adoptees on average are struggling more than those raised by their biological parents.) The donor offspring are more likely than the adopted to have struggled with addiction and delinquency and, similar to the adopted, a significant number have confronted depression or other mental illness. Nearly half of donor offspring, and more than half of adoptees, agree, “It is better to adopt than to use donated sperm or eggs to have a child.”

Id.

19. See *id.* According to one donor-conceived woman, “[w]hen you grow up and your instincts are telling you one thing and your parents—the people you are supposed to be able to trust the most in your life—are telling you something else, your whole sense of what is true and not true is all confused.” *Id.* Another donor-conceived person explains, “[f]or those of us who found out through DNA testing, and sort of had the rug pulled out from under us, it’s a very jarring, strange experience of ‘Oh, your family’s not your family, your ancestry’s not your ancestry.’ And it’s sort of like adoption, but it’s not.” Louise McLoughlin, *The Jarring Experience of Learning You Were*

and affordable,²⁰ more donor-conceived people are discovering the full truth of their origins.²¹ Learning this may bring pain and frustration with the lack of regulation in the fertility industry.²²

This obfuscation of a child's genetic origins "affects the child's ability to 'develop a full sense of identity' and in all cases implicates the right to identity."²³ The currently unregulated state of gamete donation privileges the desires of an adult wanting to have a child over the rights of the child to have access to her biological identity.²⁴

Gamete donation also shifts the question of parentage from one of *status* to one of *contract*. While these contracts empower adults who want children to acquire them, children are necessarily commodified in the transaction.²⁵ Parentage based on acquiring genetic materials through the marketplace, rather

Conceived With Donor Sperm or Eggs, VICE (Sept. 21, 2018 7:23PM), https://tonic.vice.com/en_us/article/yw4wzy/the-jarring-experience-of-learning-you-were-conceived-with-donor-sperm-or-eggs (internal quotations omitted).

20. Antonio Regalado, *More Than 26 Million People Have Taken an At-Home Ancestry Test*, MIT TECHNOLOGY REVIEW (Feb. 11, 2019), <https://www.technologyreview.com/2019/02/11/103446/more-than-26-million-people-have-taken-an-at-home-ancestry-test/>. According to industry estimates, more than 26 million people have used at-home genetic genealogy tests, with the majority of those sales in the United States. *Id.* Researchers note that the pace has accelerated just in the last year to the point that "[a]s many people purchased consumer DNA tests in 2018 as in all previous years combined." *Id.* At this rate, online DNA databases are predicted to carry the genetic information of more than 100 million people within the next two years. *Id.*

21. See, e.g., Tyler Hayes, *In the 23andMe Era, Kids of Sperm Donors Are Finding Each Other*, FAST COMPANY (Sept. 26, 2018), <https://www.fastcompany.com/90234700/in-the-23andme-era-kids-of-sperm-donors-are-finding-each-other>; Ashley Fetters, *Finding the Lost Generation of Sperm Donors*, THE ATLANTIC (May 18, 2018), <https://www.theatlantic.com/family/archive/2018/05/sperm-donation-anonymous/560588/>.

22. Fetters, *supra* note 21 (stating "while donors in the '80s and '90s most often planned on staying anonymous, in the time since McKinney and Sanchez were born, the rise of consumer DNA testing has made this much less certain. Meanwhile, industry practice and consensus among psychologists are moving away from anonymous donations, such that the era when anonymity is the expectation appears to be over."); see also McLoughlin, *supra* note 19. One woman reported her confrontation of her father after a DNA test:

I asked him when he had planned to tell me, and it seemed like there hadn't been a plan, or the plan was just to go to the grave with it. That made me really angry....And that anger and frustration built as I was trying to find the donor, because the system is set up to make that very, very hard.

Id.

23. Theodore McCombs & Jackie Shull González, *Right to Identity*, U.C. BERKLEY SCH. OF L. INT'L HUM. RTS. L. CLINIC 1, 4 (2007).

24. Vardit Ravitsky, "Knowing Where You Come From": *The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness*, 11 MINN. J. L. SCI. & TECH. 665, 665-67 (2010); see also Elizabeth Howard, *My Dad Was a Sperm Donor. My Lack of Identity Reflects His*, THE GUARDIAN (Jan. 16, 2014), <https://www.theguardian.com/commentisfree/2014/jan/16/dad-sperm-donor-lack-identity-delivery-man> (arguing that donor-conceived children are deprived of their right to identity on the basis of their parents' wishes for children).

25. See Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1112 (2014).

than a biological bond between parent and child, will mean a different relationship for the child involved.²⁶ And unlike marriage, which is both a status and a contract,²⁷ a key party involved (indeed, the party whose existence is the point of the contract) is not able to consent to the terms of the agreement.²⁸ This Comment will examine the inequities inherent in the contract for anonymous gamete donation and how the revolution in at-home genetic testing may present a new contract that supersedes it.

While the United States Supreme Court has never ruled that children have a right to access their biological identity, the Court has discussed a child's biological identity as a matter of children's moral and legal rights in other cases involving children's family connections.²⁹ This Comment will explore those rulings in light of the right to identity, looking at family law cases that balance the constitutional right of parenting with the liberty interest of the child. Beginning with *Lehr v. Robertson*, where the Supreme Court noted that "judges neither create nor sever genetic bonds,"³⁰ Part I, Secs. A through D of this Comment will explore the Court's recognition that the biological bond between parent and child is meaningful, including cases where egg and sperm donors asserted their parental rights (*D.M.T. v. T.M.H.*³¹ and *L.F. v. Breit*³²).

Sec. E of this Comment will examine the way Justice Sotomayor's dissent in *Adoptive Couple v. Baby Girl*³³ extended the legal argument to the right to identity. Sec. F will also explore international law pertaining to the rights of the child and address the argument that donor privacy and parental rights require total anonymity. Finally, in Sec. II, this Comment will propose ways of balancing a child's right to know with the parent's desire for a child via assisted reproductive technology, including gamete donation. If the biological bond between parent and child contains meaning,³⁴ this meaning is not limited to only that which is willed and chosen by the biological parent. The meaning also exists

26. See *id.* at 1078.

27. See LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 223 (2d ed. 2018) (stating "the Restatement (First) rules represent an uneasy compromise between the vision of marriage as contract—to be governed by the jurisdiction where the marriage is celebrated—and the vision of marriage as status—to be governed by the principles of morality and public policy of the jurisdiction where the parties are domiciled.").

28. Naomi Cahn, *The New "Art" of Family: Connecting Assisted Reproductive Technologies & Identity Rights*, 18 U. ILL. L. REV. 1444, 1454 (2018) (stating "[t]he parents purchase the donor gametes. The procurement of the gametes is an arrangement in which the children are—necessarily—not involved. Parents are legally entrusted with their children's care, custody, and medical choices when their children are minors, but, certainly by the time the children reach adulthood, they have independent rights.").

29. See HELEN M. ALVARÉ, PUTTING CHILDREN'S INTERESTS FIRST IN U.S. FAMILY LAW AND POLICY: WITH POWER COMES RESPONSIBILITY 114–16 (2018).

30. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

31. See *D.M.T. v. T.M.H.*, 129 So.3d 320, 327 (Fla. 2013).

32. See *L.F. v. Breit*, 285 Va. 163, 170 (2013).

33. See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 667–68 (2013) (Scalia, J., dissenting).

34. *Id.* at 673 (Sotomayor, J., dissenting).

for the child looking back to the parent, regardless of the parent's conception of his relationship to the child.³⁵

I. THE LAW ON PARENTAL RIGHTS AS IT RELATES TO A CHILD'S IDENTITY

The United States Supreme Court is loath to deal with issues of family law and notes that this area is governed by state law, not federal,³⁶ but challenges under alleged violations of due process have occasionally brought family law matters to the Court.³⁷ The Court has recognized that "a natural parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right."³⁸ In cases dealing with state terminations of parental rights, the Supreme Court has noted that this severance is not simply "infring[ing] that fundamental liberty interest, but [] end[ing] it."³⁹ The Court concedes that, for the parent, having a relationship with his or her child is not simply important, but special, such that the deprivation of the right to know one's child is "a unique kind of deprivation."⁴⁰ In such cases, the parent's interest in "the decision to terminate his or her parental status is, therefore, a commanding one."⁴¹

A. *Lehr: Biology Is Not Enough on Its Own, But It Is Something*

Such was the basis for *Lehr*, an unmarried father who tried to have the adoption of his child vacated in *Lehr v. Robinson*, objecting to the termination of his parental rights.⁴² *Lehr* neither lived with nor supported his child, but he argued that his due process rights were violated by the denial of his parental rights as the child's biological father.⁴³ The Court reasoned that an unwed father who "demonstrates a full commitment to the responsibilities of parenthood by

35. *Lehr*, 463 U.S. at 256.

36. *Santosky v. Kramer*, 455 U.S. 745, 771 (1982) (Rehnquist, J., dissenting). As Justice Rehnquist wrote in his dissent, "[t]hroughout this experience the Court has scrupulously refrained from interfering with state answers to domestic relations questions. 'Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements.'" *Id.* at 771 (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

37. See, e.g., *Lehr*, 463 U.S. at 250; *Santosky*, 455 U.S. at 747-48; *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 33-34 (1981) (holding that it does not offend the Fourteenth Amendment's Due Process Clause to permit trial court's discretion in determining whether to appoint counsel to indigent parents in termination of parental rights hearings, however States are permitted to statutorily require more than that); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (affirming a lower court ruling that an illegitimate father did not have veto power as a matter of due process over his son's adoption); *Smith v. Organization of Foster Families*, 431 U.S. 816, 819-20 (1977).

38. *Santosky*, 455 U.S. at 758-59 (quoting *Lassiter*, 452 U.S. at 27).

39. *Id.* at 759.

40. *Lassiter*, 452 U.S. at 27.

41. *Id.*

42. *Lehr*, 463 U.S. at 249, 253.

43. *Id.* at 249-50.

‘[coming] forward to participate in the rearing of his child’⁴⁴ has an interest in the child that “acquires substantial protection under the Due Process Clause.”⁴⁵

The Court acknowledged the connection between generations, writing that “[t]he intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.”⁴⁶

But biology alone was not enough to establish the right of parentage for an unmarried father who did not have custody of or contribute support for his child.⁴⁷ The Court confirmed the dismissal of his motion to vacate the adoption, reasoning that

[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.⁴⁸

The majority in *Lehr* was careful to recognize that the biological tie requires some protection,⁴⁹ but a dissent signed by Justices White, Marshall, and Blackmun argued that the majority missed the real protected interest of every parent:

The “biological connection” is itself a relationship that creates a protected interest. Thus the “nature” of the interest is the parent-child relationship; how well developed that relationship has become goes to its “weight,” not its “nature.” Whether *Lehr*’s interest is entitled to

44. *Id.* at 261 (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

45. *Id.*

46. *Id.* at 256.

47. Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 340–41 (1984). While the biological tie between an unwed father and his child is enough to establish the father’s interest in having the opportunity for a relationship with the child, the father must take advantage of what opportunity he has to establish that relationship in order to assert his claim. *Id.*

48. *Lehr*, 463 U.S. at 262.

49. *Id.* at 256. In acknowledging the power of the biological tie between parent and child, the Court wrote:

The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases. In deciding *whether this is such a case*, however, we must consider the broad framework that has traditionally been used to resolve the legal problems arising from the parent-child relationship.

Id. (emphasis added).

constitutional protection does not entail a searching inquiry into the quality of the relationship but a simple determination of the *fact* that the relationship exists—a fact that even the majority agrees must be assumed to be established.⁵⁰

As Justice White went on to note, the Court has upheld the constitutional protections of familial bonds “whether or not legitimized by marriage.”⁵¹ Further, Justice White argued that “it cannot be disputed that *both the child and the putative father have a compelling interest* in the outcome of a proceeding that may result in the termination of the father-child relationship.”⁵²

B. *D.M.T. v. T.M.H.: Biology Matters in Divorce Between Two Mommies*

A recent case in Florida highlights the importance courts place on biology, even in novel contexts such as same-sex marriages where couples use assisted reproductive technology to have children.⁵³ In *D.M.T. v. T.M.H.*, the biological mother of the child was married to the birth mother.⁵⁴ In the process of donating her egg to her spouse, the biological mother relinquished her parental rights under a Florida statute.⁵⁵ After the relationship ended, and the couple divorced, the biological mother filed a petition to establish parental rights and challenged the statute terminating her rights as a donor parent as unconstitutional.⁵⁶

The Florida Supreme Court affirmed the Court of Appeal’s reversal of the trial court below, which granted summary judgment for the birth mother and against the biological mother.⁵⁷ Citing “the sanctity of the biological connection’ between parents and children,” the Florida Supreme Court explained, “we look carefully at anything that would sever the biological parent-child link.”⁵⁸

The biological mother in this case argued that the court should consider her rights as those of an unwed biological father who shows “a full commitment to

50. *Id.* at 272 (White, J., dissenting).

51. *Id.* at 270 (White, J., dissenting) (quoting *Little v. Streater*, 452 U.S. 1, 13 (1981)).

52. *Id.* (White, J., dissenting) (emphasis added).

53. See *D.M.T. v. T.M.H.*, 129 So. 3d 320, 328 (Fla. 2013) (explaining that “in reaching our conclusion, we rely on long-standing constitutional law that a unwed biological father has an inchoate interest that develops into a fundamental right to be a parent...”).

54. *Id.* at 327.

55. *Id.* According to the statute,

The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement under s. 63.213, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children. Only reasonable compensation directly related to the donation of eggs, sperm, and preembryos shall be permitted.

Fla. Stat. Ann. § 742.14 (West 2015).

56. *D.M.T.*, 129 So. 3d at 327–28.

57. *Id.* at 327–28, 330–31.

58. *Id.* at 335 (quoting *G.W.B. v. J.S.W.* (in *Re Baby E.A.W.*), 658 So. 2d 961, 967 (Fla. 1995)).

the responsibilities of parenthood,” as per the United States Supreme Court’s reasoning in *Lehr*.⁵⁹ The Florida Supreme Court agreed, finding that the biological mother had

a fundamental right deserving of constitutional protection under the Due Process Clauses of the Florida and United States Constitutions....Therefore, the burden falls on the birth mother to demonstrate that application of the assisted reproductive technology statute to deprive the biological mother of her fundamental right to be a parent furthers a compelling governmental interest through the least intrusive means.⁶⁰

The Florida Supreme Court cited to a Virginia case discussed below,⁶¹ where a sperm-donor claimed parental rights under a different “assisted conception” statute than that adopted by Florida;⁶² nevertheless, the Florida Supreme Court found the cases were similar enough to embrace the same conclusion that no compelling reason exists “why a responsible, involved, unmarried, biological parent should never be allowed to establish legal parentage of her or his child born as a result of assisted conception.”⁶³

C. *L.F. v. Breit: Donor-Conceived Child Has a Right to Her Father*

The Virginia case cited by the Florida Supreme Court above involves a heterosexual couple who had trouble conceiving naturally and sought reproductive assistance using the couple’s own gametes.⁶⁴ While they cohabited, they never married and ended up separating four months after their daughter’s birth.⁶⁵ The father supported the child until the mother cut him off from all contact, at which point the father sued for custody.⁶⁶ The mother filed a motion to dismiss, arguing that the father was barred from being her child’s legal parent because they were never married and the child was conceived through assisted conception.⁶⁷ The Virginia “assisted conception” statute explicitly addressed donor parentage, stating that “[a] donor is not the parent of a child conceived through assisted conception, *unless the donor is the husband of the gestational mother.*”⁶⁸

59. *Id.* at 337 (quoting *T.M.H. v. D.M.T.*, 79 So. 3d 787, 797 (Fla. 5th DCA 2011)).

60. *Id.* at 340.

61. *Id.* at 341 (citing *L.F. v. Breit*, 285 S.E.2d 711, 722 (Va. 2013)).

62. *Id.* (citing *L.F.*, 285 S.E.2d at 722).

63. *Id.* (quoting *L.F.*, 285 S.E.2d at 722).

64. *L.F.*, 285 S.E.2d at 715.

65. *Id.*

66. *Id.*

67. *Id.* at 716.

68. Va. Code Ann. § 20-158(A)(3) (West 2016) (emphasis added). The Virginia court acknowledged that the assisted conception statute

does make distinctions based on marital status: a male donor is afforded rights as a parent only if he is married to the gestational mother. But marital status is not a suspect

The Virginia Supreme Court rejected the mother's argument and applied *Lehr* to find that the father had demonstrated commitment to parenting the child that activated his parental rights as an unmarried father.⁶⁹

Interestingly, the mother in the case tried to argue that a child has the right *not* to have a parent.⁷⁰ The Virginia Supreme Court

reject[ed] the notion that children have a purported right or interest in *not* having a father. To the contrary, Virginia case law makes clear that it is in a child's best interests to have the support and involvement of both a mother and a father, even if they are unmarried.⁷¹

In rejecting the mother's claim that a child has a right *not* to know her father, the Virginia Supreme Court emphasized the child's "liberty interest in establishing relationships with [her] parents."⁷² The court held that the child in this case faced "a potential loss of liberty in the form of deprivation of a relationship with her biological father, solely because she was conceived through assisted conception by unmarried parents."⁷³

D. Troxel v. Granville: Children Aren't Chattel

In 2000, the United States Supreme Court addressed a parental rights case coming from Washington state where a state law allowed "any person" to petition state courts for child visitation rights "at any time" over parental objections.⁷⁴ The Washington Superior Court granted visitation rights to grandparents over the mother's objection; however, the Washington Court of Appeals reversed the visitation holding.⁷⁵ The Washington Supreme Court

classification under the Equal Protection Clause. See *Eisenstadt v. Baird*, 405 U.S. 438, 446–47... (1971). Therefore, disparate treatment of unmarried donors is analyzed to determine whether there is a rational basis for such treatment. "A classification reviewed under a rational basis standard 'is accorded a strong presumption of validity.'" *Gray v. Commonwealth*, ... 645 S.E.2d 448, 459 (2007) (quoting *Heller v. Doe*, 509 U.S. 312, 318–21... (1993)). Such a classification will stand if there is a rational relationship between the disparate treatment and some legitimate governmental purpose. *Id.*

L.F., 285 S.E.2d at 721. In this case, the Virginia court found that the state had "a significant interest in encouraging the institution of marriage," and the statute's "objective of protecting married couples from potential interference by donors is rationally related to that legitimate governmental purpose." *Id.*

69. *L.F.*, 285 S.E.2d at 721–22.

70. *Id.* at 723.

71. *Id.*

72. *Id.* (citing *Commonwealth ex rel. Gray v. Johnson*, 7 S.E.2d 787, 791 (Va. 1989)).

73. *Id.* The Virginia court also said that "there is no compelling reason why a responsible, involved, unmarried, biological parent should never be allowed to establish legal parentage of her or his child born as a result of assisted conception." *Id.* at 722. This statement on its own would seem to undermine the objective of protecting the intended parents from the legal claims of a biological parent/donor.

74. *Troxel v. Granville*, 530 U.S. 57, 60 (2000).

75. *Id.* at 61–62

affirmed, and the grandparents appealed to the United States Supreme Court.⁷⁶ The United States Supreme Court struck down the law as an unconstitutional violation of the fundamental liberty interest of parents “to make decisions regarding the care, custody, and control of their children.”⁷⁷

Justice Stevens dissented, joined by Justices Scalia and Kennedy, arguing that the “best interest of the child” standard was what the Court should have used.⁷⁸ It was the child who was not considered by the majority, Stevens wrote:

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child’s best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.⁷⁹

While Justice Stevens acknowledges that the Court has reserved the question of whether a child has a protected interest in preserving familial bonds, he wrote that “it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.”⁸⁰

This proportional relationship recognizes the dignity of children as more than the property of their parents. Justice Stevens elucidates this in writing, “[a]t a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.”⁸¹

Justice Stevens’s insistence that children are not “so much chattel” becomes increasingly important in the context of assisted reproductive technology, where parents pay thousands of dollars for donated sperm and tens of thousands for donated eggs.⁸²

E. Adoptive Couple v. Baby Girl: The Battle for the Biological Bond

In 2013, the United States Supreme Court ruled on a closely watched custody case between a couple in South Carolina who had adopted a baby girl and her

76. *Id.* at 62–63.

77. *Id.* at 66.

78. *Id.* at 83 (Stevens, J., dissenting).

79. *Id.* at 86 (Stevens, J., dissenting).

80. *Id.* at 88 (Stevens, J., dissenting). Justice Stevens discusses the nature of the child’s liberty interest and cautions the Court to consider them, saying, “[i]t seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.” *Id.* at 91 (Stevens, J., dissenting).

81. *Id.* at 88–89 (Stevens, J., dissenting).

82. See *Egg Donor Costs + Fees*, *supra* note 5; *Donor Insemination*, AMERICAN PREGNANCY ASSOCIATION, <http://americanpregnancy.org/infertility/donor-insemination/> (last visited Mar. 27, 2019).

biological father, who was a member of the Cherokee Nation.⁸³ Seeking to gain custody of his daughter, the father opposed adoption proceedings and invoked the Indian Child Welfare Act (ICWA),⁸⁴ and a media firestorm ensued.⁸⁵

While the case was ostensibly about the Indian Child Welfare Act, a 1978 law designed to protect Native families from having children taken from them,⁸⁶ both

83. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641–42 (2013).

84. *Id.* at 642–43, 645. The United States District Court for the Northern District of Texas recently held parts of the Indian Child Welfare Act unconstitutional at the urging of the states of Texas, Louisiana, and Indiana as well as foster and adoptive parents. *See Brackeen v. Zinke*, 338 F. Supp. 3d 514, 546 (N.D. Tex., 2018). The case involved three Native children who were taken into non-Native homes. *Id.* at 525–27. Two of the cases involved children living with foster parents who sought to adopt while maintaining the children’s relationships with their biological parents. *Id.* The Navajo nation wanted the first child to go to a non-relative Navajo placement in New Mexico, and the Pueblo Tribe intervened in the adoption of the other child. *Id.* at 525–26. The third case involved a child who was removed from a placement with a non-Native family seeking to adopt her and returned to the care of her maternal grandmother, whose foster license had been revoked. *Id.* at 527. Judge Reed O’Connor found that the Indian Child Welfare Act is a race-based statute requiring strict scrutiny and is not narrowly tailored to a compelling government interest, granting the equal protection claim raised by the adoptive and foster parents. *Id.* at 536. Since then, other courts have noted the decision, but continued to address issues raised by the Indian Child Welfare Act because they are not bound by the lower federal court’s holding, and the *Brackeen* decision “may be appealed and ICWA has previously been upheld by the United States Supreme Court.” *People ex rel. M.D.*, 920 N.W.2d 496, 500 n. 4 (S.D. 2018) (presuming the ICWA as constitutional due to Supreme Court affirmations and noting that the South Dakota Supreme Court is not bound by the Texas district court’s holding in *Brackeen*). *See also In re L.R.D.*, 128 N.E.3d 926, 936 (Ohio App. 2019) (Blackmon, J., concurring in judgment only) (explaining, “I believe that this court’s law concerning compliance with ICWA may need to be developed further as cases present themselves. This is of particular concern in light of *Brackeen v. Zinke*...which declared sections 1901–1923 and 1951–1952 of ICWA unconstitutional.”); *In re A.M.*, 570 S.W.3d 860, 863 (Tex. App. 2018) (dismissing an argument based on *Brackeen* as unpersuasive because ICWA has been upheld by the United States Supreme Court). In fact, the Fifth Circuit granted appellants’ motion for a stay of the district court’s order pending appeal. *Brackeen v. Cherokee Nation*, No. 18-11479 2018, U.S. App. LEXIS 36903, *6 (5th Cir. 2018).

85. *See* Andrew Cohen, *Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington*, THE ATLANTIC (Apr. 12, 2013), <https://www.theatlantic.com/national/archive/2013/04/indian-affairs-adoption-and-race-the-baby-veronica-case-comes-to-washington/274758/>; Josh Voorhees, *The Long, Complicated “Baby Veronica” Saga Comes to an Unsatisfying End*, SLATE (July 17, 2013 8:54PM), <https://slate.com/news-and-politics/2013/07/adoptive-couple-vs-baby-girl-south-carolina-court-sends-baby-veronica-back-to-the-capobiancos.html>; Hansi Lo Wang, *Happy Ruling For Adoptive Couple, Uncertainty For Baby Girl*, NPR (June 26, 2013 4:00AM), <https://www.npr.org/sections/codeswitch/2013/06/26/195787510/Supreme-Court-Sides-With-Adoptive-Family-In-Dispute>.

86. *Adoptive Couple*, 570 U.S. at 649 (noting, “the primary mischief the ICWA was designed to counteract was the unwarranted removal of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts.”). The text of the Indian Child Welfare Act says its purpose is

to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children and placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture...

Indian Child Welfare Act, 25 U.S.C. § 1902 (2012).

the majority and the dissent in the case went beyond the text of the ICWA and focused on the Court's family law precedents and balancing the rights of the father with the best interests of the child.⁸⁷

Baby Girl was an Indian child put up for adoption by her biological mother, who was non-Indian and had sole custodial rights.⁸⁸ Her biological father was unmarried and never had custody of her, but objected to her adoption and sought custody when Adoptive Couple served him with notice of the pending adoption in South Carolina, where Adoptive Couple lived.⁸⁹ After a trial, the South Carolina Family Court denied Adoptive Couple's adoption petition and awarded custody to Baby Girl's father.⁹⁰ The State Supreme Court affirmed, "concluding that the ICWA applied because the child custody proceeding related to an Indian child; that Biological Father was a 'parent' under the ICWA; that §§1912(d) and (f) barred the termination of his parental rights; and that had his rights been terminated, §1915(a)'s adoption placement preferences would have applied."⁹¹

The majority, written by Justice Alito, found that the ICWA did not bar the state from terminating the father's parental rights because "Biological Father should not have been able to invoke §1912(f) in this case, because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings."⁹²

The dissent, written by Justice Sotomayor, rejects that conclusion not on the grounds of the ICWA but on the grounds of Biological Father's status as Baby Girl's parent.⁹³ Justice Sotomayor admonished the Court for abandoning what

According to the Bureau of Indian Affairs, "ICWA provides guidance to States regarding the handling of child abuse and neglect and adoption cases involving Native children and sets minimum standards for the handling of these cases." *Indian Child Welfare Act (ICWA)*, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, <https://www.bia.gov/bia/ois/dhs/icwa> (last visited Mar. 27, 2019).

87. See *Adoptive Couple*, 570 U.S. at 655–56. The Court discussed that [t]he ICWA was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests.

Id.

88. *Id.* at 641.

89. *Id.* at 644.

90. *Id.* at 645.

91. *Id.* at 637–38.

92. *Id.* at 650.

93. *Id.* at 671 (Sotomayor, J., dissenting); see *Federal Statutes and Regulations: G. Indian Child Welfare Act - Termination of Parental Rights - Adoptive Couple v. Baby Girl*, 127 HARV. L. REV. 368, 374 (2013) ("Justice Sotomayor's dissent likewise [hones] in on the nature of the 'family' governed by the ICWA, rejecting the majority's conclusion for its failure to respect [Biological] Father not as an Indian but as a parent. It spends pages wading through peripheral

she describes as a recognized principle in Supreme Court cases “that biological fathers have a valid interest in a relationship with their child....And children have a reciprocal interest in knowing their biological parents.”⁹⁴

Justice Sotomayor cited a line of case precedents in support of her claim that the court could not now pretend that biological parentage had no meaning for the parent or the child.⁹⁵ She claimed the majority failed to adhere to “the principle, recognized in our cases, that the biological bond between parent and child is meaningful.”⁹⁶ This principle is illustrated clearly in the cases Justice Sotomayor cites, including *Santosky*, where the court “describ[ed] the foreclosure of a newborn child’s opportunity to ‘ever know his natural parents’ as a ‘los[s] [that] cannot be measured.’”⁹⁷

Justice Sotomayor further develops this line by arguing that the rules governing the ICWA “reflect the understanding that the biological bond between a parent and a child is a strong foundation on which a stable and caring relationship may be built. Many jurisdictions apply a custodial preference for a fit natural parent over a party lacking this biological link.”⁹⁸

This line of legal reasoning is not an outlier but “consistent with many of American family law’s impulses about maintaining children’s links with their biological parents when possible....It moves in a direction opposite to the normalization of parent/child separations.”⁹⁹

ICWA provisions purely to drive home that [Biological] Father ‘has a federally recognized status as Baby Girl’s ‘parent’; only then does it locate the heart of its critique in the Court’s seemingly unimplicated fathers’ rights jurisprudence....”)

94. *Adoptive Couple*, 570 U.S. at 686 (2013) (Sotomayor, J. dissenting) (citing *Santosky v. Kramer*, 455 U.S. 745, 758–61) (1982)).

95. *See Id.*

96. *Id.* at 673 (Sotomayor, J., dissenting). This principle is the foundation for this Comment’s argument, which takes Justice Sotomayor’s view of family law jurisprudence both as a matter of history and of human rights. *Id.*

97. *Id.* at 686 (Sotomayor, J., dissenting) (quoting *Santosky v. Kramer*, 455 U.S. 745, 760–61, n. 11) (1982)). The newborn mentioned in the *Santosky* case was only three days old when he was removed from his biological parents’ custody. *Santosky v. Kramer*, 455 U.S. 745, 750 (1982). He was also prevented from knowing his two younger siblings, born later to the same parents but not taken from their parents by the state of New York. *Id.* at 753 n.5. The Court in *Santosky* further held that “until the State proves parental unfitness, the child and his parents *share a vital interest* in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.” *Id.* at 760–61 (emphasis added).

98. *Adoptive Couple*, 570 U.S. at 686 (Sotomayor, J., dissenting) (internal citations omitted).

99. Alvaré, *supra* note 29, at 116. Elsewhere Professor Alvaré makes it clear that the Supreme Court

has never held explicitly that children have a “right to their identity,” meaning a right to know and be known by their biological parents. At the same time, it is clear from our cases, and from a wide variety of federal and state laws, that the loss of either parent is regarded as a tragedy to be avoided....[M]embers of this Court opine in favor of a child’s “right” to relations with their family.

F. The Rights of the Child in International Law

The right to identity is not precisely defined, but it exists at law as a human right recognized by the United Nations Convention on the Rights of the Child (CRC) in Article 8:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.¹⁰⁰

This explicit protection of the child's right to identity does not define the term, but it is said to include "nationality, name, and family relations."¹⁰¹ "Family relations" is usually not limited to legal parents but "extending to biological and birth parents."¹⁰² The jurisprudence developing around this Article as applied to donor-conceived people suggests that "acquiring the ability to retrace one's personal history is a question of liberty, and therefore, human dignity."¹⁰³

In 2004, the United Kingdom moved to ban anonymity for gamete donors in an effort to protect the rights of donor-conceived children.¹⁰⁴ In the House of Lords debate on the question, Baroness Elizabeth Kay Andrews, then-Government Whip for the Labour Party,¹⁰⁵ based her reasoning on the right to identity:

Some [donor-conceived people] have said, for example, very poignantly that not being able to find out about their origins has left them with a gap in the way they see themselves, a gap in their identity, in their ability to tell their own story—and we are, after all, story-

Helen M. Alvaré, *A Children's Rights Perspective Dissent from Obergefell*, LS 18-06. GE. MASON LEGAL STUD. RES. PAPER 1, 12–13 (2018).

100. G.A. Res. 44/25 (VIII), Convention on the Rights of the Child (Nov. 20, 1989).

101. *Id.*

102. Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT'L & COMP. L. 619, 627 (2012).

103. *Odièvre v. France*, App. No. 42326/98, 3 (Eur. Ct. H.R.) (Joint Dissenting Opinions of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää). The recognition of the right to identity may be one reason why countries which respect international law regulate gamete donation and, in some cases, ban gamete donor anonymity. Cohen, *supra* note 7, at 469.

104. *Sperm Donor Anonymity Ends: People Donating Sperm and Eggs Will No Longer Remain Anonymous, Under a New Law Which Came Into Force on Friday*, BBC NEWS (March 31, 2005), <http://news.bbc.co.uk/2/hi/health/4397249.stm>. According to BBC News, "Laura Witjens, chair of the NGDT, said evidence from other countries, such as Sweden, which had already removed anonymity rights, showed it was no longer young students who donated." *Id.*

105. Baroness Andrews, UK PARLIAMENT, <https://www.parliament.uk/biographies/lords/baroness-andrews/2534> (last visited Mar. 27, 2019). It is worth noting that the push for a ban on donor anonymity was seen as politically progressive in the United Kingdom.

telling animals—and an inability to make complete sense of their lives.¹⁰⁶

The Baroness urged her peers to “reflect the paramount rights of the child in these provisions” as “more information might be sought and need to be given.”¹⁰⁷

Of course, not everyone is convinced by the right to identity. Jill Marshall at the University of London argues that “[t]here is no human right to have exact knowledge of the identity of your genetic or biological parents.”¹⁰⁸ Instead, she argues for “a more sophisticated version of identity.”¹⁰⁹ Rather than the “fixed” identity of “biological parentage,” she would have “[a] more fluid idea of identity focusing on lived experience and one’s existence, permitting change and space to change or personal choice to remain....”¹¹⁰ This “sophisticated” version

106. Baroness Andrews, *Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004*, THEYWORKFORYOU, (June 9, 2004), <https://www.theyworkforyou.com/lords/?id=2004-06-09a.344.0&s=2004-01-01..2004-12-31+speaker%3A13108#g344.1>.

107. *Id.*

108. Jill Marshall, *Concealed Births, Adoption and Human Rights Law: Being Wary of Seeking to Open Windows into People’s Souls*, 71 Cambridge L.J. 325, 351 (2012).

109. *Id.* at 351. Professor Marshall acknowledges that the fixed view of identity is what animated the push to ban donor anonymity in Britain:

Reasons given for this change depend in large part on ideas of personal identity equating to self-realisation, authenticity and truth as to one’s parentage, reflecting a seemingly growing attitude that one is not “complete”, is deprived of a fixed identity, unless there is exact knowledge of one’s genetic or biological origins.

Id. at 348. She goes on to argue that the right to identity is not about the rights of the child because many donor-conceived people will not have access to information about their origins until they reach age eighteen, at which point they are no longer “children.” *Id.* at 349. This argument suggests that her definition of “child” is narrowly limited to an age (minor, or under eighteen) and excludes the otherwise common understanding of “child” as a relational status (“child of so-and-so,” descended from a father and mother).

110. *Id.* at 351. Professor Marshall’s argument for limiting the child’s right to identity to exclude the right to information of one’s biological origins prioritizes the autonomy of the mother in the case of anonymous adoption over the right of the child to have access to this information. *Id.* Professor Marshall argues that no balancing test is necessary between the rights of the mother and the rights of the child because the child’s right to identity completely avoids conflicting with the mother’s right to autonomy and privacy:

[I]f a human right to identity is interpreted in a self-determining fashion in keeping with the overall purpose of human rights law to respect human dignity and human freedom. The child does have an identity right as a matter of human rights law: under the CRC to know as far as possible his or her parentage, and under the ECHR, as more convincingly interpreted in line with human rights law’s purpose, to have a right to personal identity meaning self-determining existence.

Id. at 350. Professor Marshall’s argument requires non-obvious interpretations of multiple terms nested together in the text of the human rights provisions cited, but by rendering “personal identity” as mere “self-determining existence” the child is limited to herself as the only means of knowing herself. Thus, she argues:

When personal choices can be made which accept the potential of each individual to form projects and exist in the world in a meaningful way as they see it and or to change their

of identity is not what most donor-conceived people have in mind when they read the Convention on Child Rights.

II. A ROBUST VISION OF IDENTITY FOR MEANINGFUL BIOLOGICAL TIES

Marshall's vision of identity, where ties between generations are severed and children born from gamete donation are cut off from the past, negates the lived experience of tens of thousands of donor-conceived people.¹¹¹ In order to understand what it is "to remain" or to have a "personal choice" in constructing their identities, as Marshall argues,¹¹² those donor-conceived people who share their stories on websites such as "The Donor Sibling Registry"¹¹³ and "We Are Donor Conceived"¹¹⁴ require the knowledge of where they came from. The ability to change requires some understanding of where one begins, after all.

If identity is a fundamental human right, it must be founded on something more than a fluid self-determination, if only because the individual must have some understanding of the self upon which to operate. To reject or accept this given self requires knowledge of the identity that is given: of nationality, ethnicity, heritage, culture, and yes, family.¹¹⁵ The United States Supreme Court

identity, to live the life of their own choosing. While the right to access information relating to one's childhood existence and development, is also part of this idea of identity, it is very different to linking identity with one's biological parentage in the sense that it is more "natural" and "authentic". The danger with presenting a view of the "human core" which is always there and can somehow be reclaimed or discovered and realised consists in fixing and constraining identity, taking us back to ideas of human nature or function and can amount to forcing us to be free.

Id. at 353.

111. Empirical studies of donor-conceived people show the majority (roughly two-thirds) want to know the identity of their biological parents. Elizabeth Marquardt, Norvald D. Glenn & Karen Clark, *My Daddy's Name Is Donor*, INSTITUTE FOR AMERICAN VALUES 96–98 (2010), http://americanvalues.org/catalog/pdfs/Donor_FINAL.pdf. The Facebook page "We Are Donor Conceived" grows by the hundreds each month, possibly as a result of growing numbers of donor-conceived children taking at-home DNA tests and discovering their missing biological origins. See *We Are Donor Conceived*, FACEBOOK, <https://www.facebook.com/groups/wearedonorconceived/> (last visited Mar. 27, 2019). Other groups of thousands exist on Facebook, including "Donor Conceived People, Siblings, Parents, and Donors (Sperm, Egg, Embryo)," where members seek advice and resources on how to track and understand their DNA. See *Donor Conceived People, Siblings, Parents, and Donors (Sperm, Egg, Embryo)*, FACEBOOK, <https://www.facebook.com/groups/DonorConceived/> (last visited Mar. 27, 2019).

112. Marshall, *supra* note 108, at 351.

113. See THE DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/blog/> (last visited Mar. 27, 2019).

114. See WE ARE DONOR CONCEIVED, <https://www.wearedonorconceived.com>, (last visited Mar. 27, 2019).

115. While this Comment assumes that such an argument would appeal to common sense, there are identity theorists who claim that there is no pre-existing, fixed identity to be found in nature, only a social construction that exists in language and performance. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 134–36 (1990). If this claim were true, we might expect donor-conceived children to have no inconsolable longing to know their parents.

has yet to rule on this issue, but the argument for a child's right to identity is latent in the Court's family law jurisprudence.¹¹⁶

A. *Biological Ties Can Still Bind*

While the United States Supreme Court in *Lehr* made it clear that it would take more than the biological fact of parentage to establish parental rights, it firmly held that the vital tie between a parent and a child merits protection.¹¹⁷

As the Court has held that the rights of children are reciprocal,¹¹⁸ it is not possible that the protection only applies unilaterally, so that only the parent's rights in knowing the child are protected. What's sauce for the gander is sauce for the gosling: if this tie merits protection for the parent, it also merits protecting the child's right in knowing the parent.¹¹⁹

Indeed, this point was expressly made by Justice White in his dissent of *Lehr*.¹²⁰ Just as the bond between parent and child need not be legitimized via marriage for either to have a constitutional claim,¹²¹ neither must the child be acknowledged by the donor parent in order for that child to have a claim to know who that parent is. The biological bonds and the rights they entail pre-exist such institutions and contracts.¹²²

This same reasoning applies in *Troxel v. Granville*, where Justice Stevens finds the child's liberty interest in her family to be proportional ("to the extent") to her parents' liberty interests in those same relationships.¹²³

B. *The Egg and Sperm Donor Cases: "Sanctity" of Ties and Rights of Children*

The Florida Supreme Court's reasoning in the egg-donor case (*D.M.T. v. T.M.H.*) found that "'the sanctity of the biological connection' between parents

Instead, the research shows that most experience this longing and find the identity of their parents to be a missing piece of themselves. See Marquardt, et al., *supra* note 111 at 96–98.

116. See Helen M. Alvaré, *Do Children Have A Right To Know Their Biological Families?*, THE DONALDSON ADOPTION INSTITUTE, (Aug. 9, 2016), <https://www.adoptioninstitute.org/news/do-children-have-a-right-to-know-their-biological-families/>.

117. *Lehr v. Robertson*, 463 U.S. 248, 256 (1983).

118. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982).

119. See *Troxel v. Granville*, 530 U.S. 57, 86, 88 (2000) (Stevens, J., dissenting).

120. *Lehr*, 463 U.S. at 270 (White, J., dissenting).

121. *Id.* (White, J., dissenting).

122. See John Finnis, *Grounding Human Rights in Natural Law*, 60 AM. J. JURIS. 199, 218 (2015).

123. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting). Justice Stevens was not considering gamete donation in this case, but his words are prescient: "The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession." *Id.* at 86 (Stevens, J., dissenting) (emphasis added).

and children” required the court to “look carefully at anything that would sever the biological parent-child link.”¹²⁴

That this biological link exists, that it has “sanctity,” and that the state has an interest in carefully examining anything that threatens to sever it, are propositions firmly rooted in the child’s right to an identity. Indeed, it is unclear what the meaning of a biological connection between parent and child would be without it.

Likewise, in the sperm-donor case (*L.F. v. Breit*) the Virginia Supreme Court laid out a strong argument for the rights of donor-conceived children, asking the question that is the sticking point for those searching for their biological identities: why should a child face “a potential loss of liberty in the form of deprivation of a relationship with her biological [parent], solely because she was conceived through assisted conception by unmarried parents”?¹²⁵

If a child has a liberty interest in knowing her sperm donor father when he is acknowledged as such and wants to be known, as in the Virginia case, why should that right then be limited by his interest or convenience? It does not follow that the right should exist for her on the basis of the biological tie, but not for the child who had an anonymous donor father. Why a child’s right to know her father would be limited by the father’s interest in being known is not self-evident beyond the inequities of power and choice in that relationship.¹²⁶

Children of sperm donors generally do not care to sue for child support: what they want, as is reported in the news articles discussed above, is the knowledge of who and where they come from—a piece of their story that has been missing.¹²⁷ In a 2017 study of adults with “open-identity” sperm donors, those

124. *D.M.T. v. T.M.H.*, 129 So. 3d 320, 335 (Fla. 2013) (quoting *G.W.B. v. J.S.W.*, 658 So.2d 961, 967) (Fla. 1995).

125. *L.F. v. Breit*, 736 S.E.2d 711, 723 (Va. 2013).

126. Consider the argument that donor-conceived people must accept their donors’ anonymity as the necessary condition of their existence. The argument goes something like, were it not for the anonymity, the donor from whom the child came would not have donated his sperm or her egg, and the child would not exist. The argument does not follow, for no child has ever willed or chosen her parents, but she has rights to their care, and they owe her certain duties, simply by nature of the biological bond.

127. See *infra* notes 113, 114. In addition to establishing a sense of identity, many donor-conceived people seek information about their donors in order to understand medical history and limit the possibility of incest. As Ariana Eunjung Cha reports in the Washington Post:

Because most donations are anonymous, the resulting children often find it almost impossible to obtain crucial information. Medical journals have documented cases in which clusters of offspring have found each other while seeking treatment for the same rare genetic disease. The news is full of nightmarish headlines about sperm donors who falsified their educational backgrounds, hid illnesses or turned out to be someone other than expected—such as a fertility clinic doctor.

And while Britain, Norway, China and other countries have passed laws limiting the number of children conceived per donor, the United States relies solely on voluntary guidelines. That has raised fears that the offspring of prolific donors could meet and fall in love without knowing they were closely related, putting their children at risk of genetic disorders.

who requested the identity of their biological parents did so because they “want[ed] to know more about the donor, especially about shared characteristics. Most adults planned to contact their donor...[and] expressed modest expectations about this contact.”¹²⁸ Those contacts, as seen when donor-conceived children meet their parents, can lead to poignant moments of connection¹²⁹ or painful moments of rejection,¹³⁰ but they may also lead to the donor-conceived person’s empowerment.¹³¹

C. The Meaning of a Biological Bond

If “the biological bond between parent and child is meaningful,”¹³² as Justice Sotomayor wrote in her dissent in *Adoptive Couple v. Baby Girl*, this meaning is not limited to only that which is willed and chosen by the biological parent. The meaning also exists for the child looking back to the parent, regardless of the parent’s conception of his relationship to the child.

And if cutting off a newborn child’s ability to “ever know his natural parents” is a “los[s] that cannot be measured,”¹³³ what is closing off the donor-conceived child’s ability to know her biological parents?

Ariana Eunjung Cha, *44 Siblings and Counting*, WASH. POST (Sept. 12, 2018), https://www.washingtonpost.com/graphics/2018/health/44-donor-siblings-and-counting/?utm_term=.2fbba51ab15f.

128. Joanna E. Scheib, Alice Ruby & Jean Benward, *Who Requests Their Sperm Donor’s Identity? The First Ten Years of Information Releases to Adults With Open-Identity Donors*, 107 FERTILITY AND STERILITY 483, 483, 489 (2017) (“[T]he...most common reason, however, given by 94.9% of adults, was based on the desire for more information—important enough that they were willing to put significant effort into obtaining their donor’s identity. Most focused on wanting to know who he was as a person and what he looked like.”).

129. See *supra* note 19. McLoughlin, tells the moving story of one donor-conceived woman: It’s the first time she and her biological father will meet, but they’re about to spend eight days together. Less than a year ago he had nothing more than a suspicion that she existed....Her laughter turns into silent sobs before she breaks into a run through the crowd. She and her father slam into each other’s arms in a drawn-out hug....They are processing the experience, she explains, adding that she views him more as a friend. “He is my father,” says Amy*, who isn’t using her last name to protect her family’s anonymity like several sources in this story. “But I don’t think of him as a *dad*.”

McLoughlin, *supra* note 19.

130. See Mary Jackson, *Dear Anonymous Dad*, WORLD (Sept. 29, 2018), https://world.wng.org/2018/09/dear_anonymous_dad. One donor-conceived man was able to identify and locate his biological father and had a brief email correspondence, reported by Mary Jackson:

Using an anonymous email address, Doran reached out to his biological father. After their second exchange, his father wrote: “I most probably participated in giving you life and exceptional genes....I should not have to be put through any personal discomfort because of that act of kind service. Good night and good life.”

Id.

131. See McLoughlin, *supra* note 19.

132. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 673 (2013) (Sotomayor, J., dissenting).

133. *Santosky v. Kramer*, 455 U.S. 745, 760–61 n.11 (1982).

In her dissent in *Adoptive Couple v. Baby Girl*, Justice Sotomayor argued that the majority abandoned what she described as a recognized principle in Supreme Court cases “that biological fathers have a valid interest in a relationship with their child....And children have a reciprocal interest in knowing their biological parents.”¹³⁴ That reciprocal interest is the nature of such relationships between parents and children.

That such a claim sounds radical today may speak to a broader estrangement between the generations not addressed by this Comment.¹³⁵ But it is worth noting that this claim came not from the traditional or conservative wing, but from arguably the most liberal justice on the court, who has spoken passionately about the importance of identity and ethnic heritage.¹³⁶

The growth of DNA testing presents a new wrinkle in the issue, as the ability to access that biological information shifts the power away from donors who desired anonymity and toward donor-conceived children who desire knowledge of their origins.¹³⁷ Online testing sites like “23andMe” and “Ancestry.com” make it easy for people to locate their biological relatives, which means more donor-conceived people are using available information to locate their parents (often, though not always, fathers) and find their identity for themselves.¹³⁸

134. *Adoptive Couple*, 570 U.S. at 686 (Sotomayor, J., dissenting).

135. Pope John Paul II wrote eloquently on this in his 1991 encyclical, *Centesimus Annus*: In order to overcome today’s widespread individualistic mentality, what is required is a concrete commitment to solidarity and charity, beginning in the family with the mutual support of husband and wife and the care which the different generations give to one another. In this sense the family too can be called a community of work and solidarity. It can happen, however, that when a family does decide to live up fully to its vocation, it finds itself without the necessary support from the State and without sufficient resources. It is urgent therefore to promote not only family policies, but also those social policies which have the family as their principle object, policies which assist the family by providing adequate resources and efficient means of support, both for bringing up children and for looking after the elderly, so as to avoid distancing the latter from the family unit and in order to strengthen relations between generations.

JOHN PAUL II, *CENTESIMUS ANNUS* ¶ 49, May 1, 1991, http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html.

136. As was reported when Sotomayor was nominated as the first Latina to the Court: Sotomayor had been heavily sculpted, if not fully defined, by her ethnicity. “It defines everything—a sense of what’s fair and what isn’t, an identity with respect to a culture,” said Sergio Sotolongo, who was a year behind Sotomayor at a Bronx high school and later at Princeton University.

Amy Goldstein & Jerry Markon, *Sotomayor Has Said Gender and Ethnicity ‘Make a Difference’ in Judging*, WASH. POST (May 27, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052600914.html>.

137. *Sperm Donor Siblings: The Growing Movement to Unite Genetic Families*, WBUR: ON POINT (Dec. 6, 2018), <https://www.wbur.org/onpoint/2018/12/06/sperm-donation-kids-sibling-network-genetic-family>.

138. Christina Farr, *She Found Her Biological Father on Ancestry and 23andMe*, FAST COMPANY (Sept. 14, 2016), <https://www.fastcompany.com/3063447/she-found-her-biological-father-on-ancestry-and-23andme>.

But for some donor-conceived people, DNA testing will not be enough. For these people, it may take changing the law to allow access to information of their biological origins.

Because the genetic bond between parent and child is meaningful¹³⁹ and impossible to sever,¹⁴⁰ a contractual agreement does not render that bond null and void. Neither does the contractual promise of anonymity to the gamete donor deter the child, a third party to the contract who nevertheless has a liberty interest at stake, from seeking the donor's identity.

And because children have a right to their parents as much as parents have a right to their children,¹⁴¹ along with the right to identity,¹⁴² a child who wants to know who her parents are should be given this information and not prevented from discovering the truth of her origins.

This argument finds support in the growing trend internationally toward openness and access to the child's genetic information.¹⁴³ Regardless of the privacy sought by the donor and the intended parents, donor-conceived children are discovering this information as fast as technology allows, and soon any question of donor anonymity may be moot.¹⁴⁴ A contract promising anonymity cannot shield a gamete donor from online DNA databases and the power of social networking. Changing the law to recognize this fact would prevent gamete donors from relying on an old paradigm where secrets were more easily hidden.

In fact, anonymous donors should be put on notice by the many recent news stories that their donation was only as confidential as their DNA. Given this new milieu, it may make sense to end gamete donor anonymity retroactively.

Australia, which has already banned anonymous gamete donation,¹⁴⁵ recently saw one state passing a law ending gamete donor secrecy retroactively.¹⁴⁶ Donors who had forgotten about making a donation to a sperm bank forty years

139. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 673 (2013) (Sotomayor, J., dissenting).

140. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

141. *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

142. G.A. Res. 44/25 (VIII), Convention on the Rights of the Child (Nov. 20, 1989).

143. Cohen et. al, *supra* note 7 at 469; *see e.g.*, Anonymity has been banned in the United Kingdom, Australia, and many European countries; *Sperm Donation Laws by Country*, WIKIPEDIA, https://en.wikipedia.org/wiki/Sperm_donation_laws_by_country (last visited Sept. 7, 2019).

144. The current discussion on privacy and genetic testing focuses on the availability of medical information to insurers, mortgage lenders, employers, pharmaceutical companies, and others interested in an individual's genetically marked predisposition to disease rather than identifying information and familial relationship disclosure. *See generally* Shanna Mason, *Privacy of Information and DNA Testing Kits*, 27 CATH. U. J. L. & TECH 161 (2018).

145. Kristen Gelineau, *Who's My Father? Australia Law ID's Once-Secret Sperm Donors*, ASSOCIATED PRESS (Aug. 2, 2018), <https://www.apnews.com/1c68e47ea91d4e5896c719250b2df091>.

146. *Id.*

previously were discovered by their biological children.¹⁴⁷ The results disrupted families and shook individuals, but also led to real connections.¹⁴⁸

Not every story is heartwarming.¹⁴⁹ But every story is worth the characters knowing who they are in relation to one another, as these relationships are key to forming one's identity.¹⁵⁰ A recurring theme in these media reports is how the traits passed from parent to child involve physical markers and other indelible signs of biological relationship.¹⁵¹ The iterations of family traits that find repetition in a child's voice, her movements, and especially her face, remind the daughter of her paternity.

This connection marks her as one in a series, with a place and a context that she may choose to accept or to change. Because it's not merely *She has her father's eyes*, but also, *She has her father's temper*: genetic resemblance is more than skin deep. On some level, every person bears the stamp of the generations who came before: *Alfred begat Edward who begat Edmund*....

Understanding "who we are and how we are connected to others" is a "fundamental aspect[] of human existence" upon which the right to one's biological identity rests.¹⁵² As John Paul II wrote in *Centesimus Annus*,

The first and fundamental structure for "human ecology" is the family, in which man receives his first formative ideas about truth and goodness, and learns what it means to love and to be loved, and thus what it actually means to be a person....[The family] creates an

147. *Id.*

148. In one case of a formerly anonymous sperm donor father found by his daughter: The warmth between them was instant. Their similarities went beyond looks. Both love Shiraz and antipasto, cheer for the same football team, and have laid-back attitudes and a cheeky sense of humor.

"Safe to say the apple has not fallen far from the tree," Diamond wrote. "I can see so much of yourself in me...especially the eyes. I've never felt anything like it."

Kristen Gelineau, *Law Ending Sperm Donor Secrecy Helps Australian Find Her Dad*, ASSOCIATED PRESS (Aug. 2, 2018), <https://apnews.com/d24e6ecc38ea49e39bba937af361ff2c>.

149. See Jackson, *supra* note 130.

150. McCombs & Gonzalez, *supra* note 23, at 10 n.57.

151. Fetters, *supra* note 21 ("The revelations and relationships that result from the new knowledge they're gaining as adults—of donors, of half-siblings—can change who they believe themselves to be and, in some sense, who they are.... There's a name for that feeling—that curiosity, that sense of a missing piece, that anxiety that some dormant aspect of themselves might one day show up and have no traceable root. In 1964, the psychologists Erich Wellisch and H.J. Sants, who studied and treated troubled adoptees, understood the lack of knowledge of one's genetic background to induce a state of what they called 'genealogical bewilderment.' Wellisch and Sants argued that not knowing one's ancestry could stand in the way of developing a clear mental image of one's body, which they argued was necessary to developing a sense of identity. They also believed genealogical bewilderment could stunt the development of feelings of belonging."); Gelineau, *supra* note 145.

152. Vardit Ravitsky, *Autonomous Choice and the Right to Know One's Genetic Origins*, 44 HASTINGS CENTER REPORT 36, 36 (2014), http://www.lecre.umontreal.ca/wp-content/uploads/2014/09/autonomous-choice-and-the-right-to-know-one27s-geneticorigins_ravitsky_hcr_2014.pdf.

environment in which children can be born and develop their potentialities, become aware of their dignity and prepare to face their unique and individual destiny.¹⁵³

III. GENETIC TESTING'S NEW DEAL FOR DONOR-CONCEIVED PEOPLE

What should be obvious from the stories of donor-conceived people is that the old expectations of donor anonymity are unrealistic and untenable in the era of at-home genetic testing.¹⁵⁴ As one Toronto lawyer specializing in assisted reproductive technology said, "it's folly to be promising anonymity to any kind of donor."¹⁵⁵

But of course, many donors *were* promised anonymity, and now it is coming undone. The contracts of twenty years ago assumed that only the doctors working with the donors and the intended parents would ever know.¹⁵⁶ One reporter called it "a situation with parallels to plenty of past instances of technology companies unleashing technical advances in spite of potential societal risks."¹⁵⁷ Here, the societal risk is the donor's privacy interest.

As a practical matter, donor anonymity will not long survive the new era of at-home genetic testing.¹⁵⁸ And if donor-conceived people have the right to

153. John Paul II, *supra* note 135, at ¶ 39. Pope John Paul II connects a lack of freedom in human reproduction to the objectification of children:

But it often happens that people are discouraged from creating the proper conditions for human reproduction and are led to consider themselves and their lives as a series of sensations to be experienced rather than as a work to be accomplished. The result is a lack of freedom, which causes a person to reject a commitment to enter into a stable relationship with another person and to bring children into the world, or which leads people to consider children as one of the many "things" which an individual can have or not have, according to taste, and which compete with other possibilities.

Id.

154. Ivan Couronne, *Home DNA Tests Doom Anonymity for Sperm, Egg Donors*, MEDICAL XPRESS (Nov. 16, 2018), <https://medicalxpress.com/news/2018-11-home-dna-doom-anonymity-sperm.html>.

155. Emily Chung, Melanie Glanz & Vik Adhopia, *Donor-Conceived People Are Tracking Down Their Biological Fathers, Even If They Want to Hide*, CBC NEWS (Jan. 25, 2018), <https://www.cbc.ca/news/technology/sperm-donor-dna-testing-1.4500517>.

156. Peter G. McGovern & William D. Schlaff, *Sperm Donor Anonymity: A Concept Rendered Obsolete by Modern Technology*, 109 FERTILITY AND STERILITY 230, 230–31 (2018). Reproductive medicine doctors are aware of this trend. Two of them wrote last year that:

Currently patients and couples can continue to pursue donor insemination and maintain the illusion of privacy and anonymity of their chosen donor....In the comfort of one's home, a cheek swab and a little time on social media can easily penetrate the "anonymity" of the sperm donation process....[T]echnical advances and the availability of genetic information, facial recognition software, and social media have crushed the illusion of donor and recipient privacy like a paper-mache castle.

Id.

157. Hayes, *supra* note 21.

158. Jennifer Cacchio, *What You Don't Know Can Hurt You: The Legal Risk of Peering Into the Gene Pool With Direct-to-Consumer Genetic Testing*, 87 UMKC L. REV. 219, 219, 232 (2018).

identity, the donors who gave them half their genetic makeup may soon find that they gave them too much information with that identifying DNA. A donor's legal recourse at that point is limited not by the terms of the gamete donation contract, but by the contract with the online genetic database:

As American consumers spend millions of dollars on these genetic tests, they are entering into legal agreements that waive vital legal rights in the event of adverse outcomes following their tests. Even when a governmental body prohibits a lab from making claims about health benefits, the consumer's legal recourse is limited. Even if a researcher uses the genetic information to identify the individual, legal remedies are limited per the Terms of Service.¹⁵⁹

The growing use of at-home genetic testing has reversed the equities of the original gamete donation contract: where donors and intended parents agreed to terms of anonymity that directly affected the children born from these contracts without their consent to those terms, now the children may sign a contract with an online database that identifies the donors and reveals the secrets of the intended parents, all without *their* consent.¹⁶⁰ A new contract will govern their genetic information privacy for the simple reason that the identifying information was donated along with the gamete in the creation of a new human person. The identifying power of DNA is irrevocable and undeniable, and it has given the person who had no representation in the first contract the opportunity to change the terms retroactively.

As the possibility of anonymity erodes, so too must donors' expectation of privacy, even those who donated decades ago.

This does not mean the donor has no right to privacy at all,¹⁶¹ but the expectation of donor privacy from their genetic offspring cannot long hold given the reality of this new technology. And that right must be balanced with the

Additional privacy concerns raised by genetic testing include revealing sensitive health and racial/ethnic information to those who may use it to discriminate. A new legal framework may have to take into account the property rights family members have in an individual's DNA:

In the case of genetic information, entire families have individual interests in the DNA "property," and the genealogical testing companies now claim ownership over that information. An individual's property interest in her own genetic information is superseded by a contract between a curious (albeit naïve) family member and a corporate database.

Id. at 232.

159. *Id.* at 235.

160. Mason, *supra* note 144, at 164–66. The two most popular at-home genetic testing companies are 23andMe and Ancestry DNA, and they both feature terms and conditions which grant broad rights to the user's genetic results, which are then sold to pharmacological companies and third-party labs. *Id.*

161. For example, the donor has the same privacy interests as other family members implicated by the sale of genetic information to third-party companies or those who would use the information to discriminate. Aliya Shain, *A Veil of Anonymity: Preserving Anonymous Sperm Donation While Affording Children Access to Donor-Identifying Information*, 19 CUNY L. REV. 313, 315 (2016).

donor-conceived person's right to know who they are and where they come from.

Donor-conceived people are becoming more visible even as the privacy interest for donors is becoming less realistic. This shift in the balance of power away from donors and intended parents and toward donor-conceived children is a correction of a gross inequity, but one not anticipated by the current regulatory scheme, which must adapt to the new age of genetic information.¹⁶²

IV. SOLUTIONS FOR THE PRIVACY CONUNDRUM

When it comes to donor anonymity, America is the outlier. Countries that have abolished donor anonymity include Austria, Germany, Sweden, Switzerland, the Australian states of Victoria and Western Australia, the Netherlands, Norway, the United Kingdom, and New Zealand.¹⁶³ These countries are far more progressive in protecting the rights of children conceived via gamete donation, and they illustrate how a different approach to gamete donation is not only possible, but practicable. This is an important point, because abolishing donor anonymity may be the right thing to do, but whether or not it will effectively secure the rights of donor-conceived children is another matter.

Relatedly, proponents of donor anonymity cite fears that the supply of willing donations will be adversely affected if anonymity is no longer promised to gamete donors.¹⁶⁴ As Naomi Cahn points out in her survey of the research on donor anonymity, "speculation about the supply of gametes in a post-anonymous world must contend with the reality of what has happened in other countries."¹⁶⁵

In 2015, a comparative study looked at jurisdictions which had banned anonymous gamete donation and found:

[T]hose jurisdictions which have experienced the greatest efficacy in the protection of the donor-conceived child's right to identity in practice have not simply laid down a bald judicial statement or legislative provision regarding the age at which access will be permitted, but have ensured the guarantee of access in practice through the establishment of central registers, the annotation of birth certificates to incentivise [*sic*] parental disclosure, and the creation of support and information systems for those parties subject to the donor

162. Cahn, *supra* note 29, at 1456, 1459. Naomi Cahn suggests that adopting a birth certificate registry similar to those required by adoption, where donor-conceived children may access donor information upon reaching adulthood. *Id.* at 1456. Such a regime, Professor Cahn argues, would provide donor-conceived people with "the capacity for 'self-authorship.'" *Id.* This proposal is similar to legislation passed in Ireland in 2015. See *infra* note 166 and accompanying text.

163. See I. Glenn Cohen, *Sperm and Egg Donor Anonymity: Legal and Ethical Issues*, in THE OXFORD HANDBOOK OF REPRODUCTIVE ETHICS 500–02 (Leslie Francis, ed., 2016).

164. Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 301–08 (2013).

165. Cahn, *supra* note 29, at 1452.

conception arrangement. Those comparative jurisdictions which have been least efficacious in securing the rights of the donor-conceived child have been circumvented by parental secrecy, the lack of a central register, the lack of legislation regulating donor conception, and the absence of recruitment of domestic donors.¹⁶⁶

This Comment will look at three possible models that incorporate the hallmarks of effectively securing the rights of donor-conceived children.

A. *The British Experience: A Lesson in Moderation*

When the United Kingdom abolished gamete donor anonymity in 2005, it adjusted for the expectations of donors by developing a two-tier system: names and addresses of those who donated before the law was passed would be protected, but other genetic information would be made available to donor-conceived people, including ethnicity, birth year, and physical descriptions; after 2005, all donor anonymity was banned.¹⁶⁷ Previous donors could remain anonymous under an argument based on reliance on their anonymity at the time of donation. This incremental transition would make abolishing donor anonymity more palatable for some, but it might also negate the real injury to the donor-conceived child who was conceived before the law went into effect and would still not have access to her biological identity.¹⁶⁸

B. *2017 Uniform Parentage Act Nods to Children but Fails to Enforce Their Rights*

Yet more incremental and immediate would be the adoption of the 2017 Uniform Parentage Act,¹⁶⁹ which is similar to a Washington state law that makes “open-ID” donation the default, unless the sperm or egg donor requests anonymity.¹⁷⁰ This would represent a low bar and likely prove ineffective, as donors would still have the ability to opt out and donor-conceived people would have no recourse to discover their biological identity, but it would be a very small step in the direction of normalizing disclosure.

166. Donna Lyons, *Extending the “Right to Identity” to Donor-Conceived Children in Ireland: A Jurisdictional Case Study*, 7 IRISH J. LEGAL STUD. 1, 34 (2017).

167. *Rules Around Releasing Donor Information*, HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, <https://www.hfea.gov.uk/donation/donors/rules-around-releasing-donor-information/> (last visited Mar. 27, 2019).

168. In Britain, the old donor anonymity rules, where the onus was on the donor to lift his or her anonymity, “weren’t working for everyone,” leading to the change in 2005 that made it possible for donor-conceived people to apply to learn about their donor parents. Natalie Gil, *I Went in Search of My Biological Mum & Found Her. This Is What Happened Next...* REFINERY29 (Feb. 3, 2019), <https://www.refinery29.com/en-gb/2019/02/221856/finding-my-egg-donor>.

169. UNIF. PARENTAGE ACT § 904 (UNIF. LAW COMM’N 2017).

170. Bonnie Rochman, *Where Do (Some) Babies Come From? In Washington, a New Law Bans Anonymous Sperm and Egg Donors*, TIME (July 22, 2011), <http://healthland.time.com/2011/07/22/where-do-some-babies-come-from-in-washington-a-new-law-bans-anonymous-sperm-and-egg-donors/>.

Considering the experience of other nations is helpful here. What strikes Americans as too radical may hardly be enough in practice. Even in countries such as Austria that recognize the right of children to know their biological identity, the system often fails to secure this right because of family secrecy, a lack of enforcement mechanisms (such as mandatory disclosure via birth certificate), and the lack of a central register for donor information.¹⁷¹

C. Australia Does Away With All Anonymity

The third option would be to do what Victoria, Australia did in 2017 and ban anonymity, not only from the time of the law's enactment but retroactively, as well.¹⁷² This move surprised donors, some of whom had forgotten they ever donated to a sperm bank, but given the growing number of headlines reporting this phenomenon, that number of forgotten donors may be dwindling.¹⁷³ The resulting shift in privacy expectations for donors would be tectonic, but allowing donor-conceived people to inquire into their donors' identities is not beyond the pale.¹⁷⁴

Regardless of which model—moderate, inadequate, or radically protective of children's identity rights—the technology empowering donor-conceived people to locate and identify parents and half-siblings through at-home genetic testing and social media has dramatically changed the landscape for donor anonymity. As more donor-conceived children find their voices and tell their stories, the glaring inequities in the donor-child relationship will make it difficult to maintain the status quo, and the advancing technologies make any promise of anonymity tenuous, perhaps even fraudulent.

V. CONCLUSION

What was unknown at the beginning of gamete donation as a means of assisted reproductive technology is undeniable now: many donor-conceived people are personally harmed when they do not have access to their origins and biological identities.¹⁷⁵

What donor-conceived people want is not to hound their donors for legal redress but an acknowledgement of what the cases in this Comment illustrate: these biological ties, these “intangible fibers that connect parent and child”¹⁷⁶ have meaning, and that meaning is profound. For the donor-conceived person, that meaning is the information that empowers her to choose how she sees and

171. Lyons, *supra* note 166, at 12 (contrasting Austria's scheme with proposed Irish legislation that “due to the annotation of birth certificates and the establishment of a central register in Ireland,...[is] more likely to give rise to an effective system of application for, and release of, identifying donor records.”).

172. Gelineau, *supra* note 145.

173. *Id.*

174. *Id.*

175. See Newman, *supra* note 12.

176. *Lehr v. Robertson*, 463 U.S. 248, 256 (1983).

interprets her biological identity. This liberty interest, while not formally recognized by the United States Supreme Court, is implied by the line of family law cases examined above and will grow more evident as more donor-conceived people tell their stories.

The balancing of interests required by this analysis is not impossible, but it has to begin with a reckoning, an acknowledgment from society that the donor-conceived child has an inherent identity, and that interest is worth protecting.¹⁷⁷

177. See Cahn, *supra* note 26, at 1123 (“We are balancing two different visions of the family: one is characterized by affective ties, openness, fairness, and respect for families and the individuals within those families, while the other is associated with protecting parental rights (even when their children become adults), privacy, and the traditional family. A legal system that does not protect each member of a family can profoundly harm those whose interests are not safeguarded.”).

